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August 20, 2004

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, TW A325
Washington, D.C. 20554

RECEIVED

AUG 20 2004

Federal Communications Commission
Office of Secretary

Re: Petition for Reconsideration
Table of Allotments
FM Broadcast Stations
MB Docket No. 02-136; RM-10458,
RM-10663, RM-10667, RM-10668

Dear Ms. Dortch:

Transmitted herewith on behalf of Mercer Island School District is an original and four copies of its Petition for Reconsideration for filing in the above-referenced matter.

Should any questions arise concerning this matter, please contact the undersigned.

Respectfully submitted,

Howard J. Barr

Enclosure

cc: Service List

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments	)	MB Docket No. 02-136
FM Broadcast Stations	)	RM-10458
Arlington, The Dalles, Moro, Fossil,	)	RM-10663
Astoria, Gladstone, Tillamook, Springfield-	)	RM-10667
Eugene, Coos Bay, Manzanita and Hermiston,	)	RM-10668
Oregon and Covington, Trout Lake, Shoreline,	)	
Bellingham, Forks, Hoquiam, Aberdeen, Walla	)	
Walla, Kent, College Place, Long Beach, Ilwaco	)	
Trout Lake and Mercer Island, Washington	)	

To: Chief, Media Bureau

PETITION FOR RECONSIDERATION

Womble Carlyle Sandridge & Rice, PLLC.
1401 Eye Street, N.W.
Seventh Floor
Washington, D.C. 20005
(202) 857-4506

August 20, 2004

SUMMARY

As demonstrated herein, the Audio Division should reconsider its grant of a first local preference to Covington, Washington and its decision to amend the FM Table of allotments by changing the KMCQ(FM) community of license from The Dalles, Oregon to, by way of Kent, Washington, the Seattle bedroom community of Covington, Washington.

Mercer Island School District ("MISD") demonstrates that Covington is not separate from the Seattle Urbanized Area and that it was not entitled to a first local preference in this matter. The Audio Division failed to adequately consider significant information and evidence contradicting Joint Petitioners' showing and failed to adequately apply the appropriate criteria or analysis.

MISD demonstrates that the Commission's *Taccoa Policy* should not have been applied in this case. MISD further demonstrates that, in any event, no grounds existed for the grant of Joint Petitioners' request to reinstate their original proposal after having abandoned it in pursuit of an alternative allotment.

MISD further demonstrates that the public interest is best served by the grant of a Class A allotment to KMIH(FM) at Mercer Island, Washington.

Before the
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Oregon and Covington, Trout Lake, Shoreline,	)	
Bellingham, Forks, Hoquiam, Aberdeen, Walla	)	
Walla, Kent, College Place, Long Beach, Ilwaco	)	
Trout Lake and Mercer Island, Washington[1]	)	

To: Chief, Media Bureau

PETITION FOR RECONSIDERATION

Mercer Island School District ("MISD"), by counsel and pursuant to Section 1.429 of the Commission's rules, hereby submits its Petition for Reconsideration of the Audio Division's action in the above-captioned matter. As demonstrated herein, the Audio Division should reconsider its grant of a first local preference to Covington, Washington and its decision to amend the FM Table of allotments by changing the KMCQ(FM) community of license from The Dalles, Oregon to, by way of Kent, Washington, the Seattle bedroom community of Covington, Washington.[2] The following is shown in support thereof:

[1] MISD submits that the community of Mercer Island should be added to the caption given its proposed allotment of Channel 283A for KMIH(FM) at Mercer Island, Washington.
[2] *Report and Order*, DA 04-2054, released July 9, 2004.

I. BACKGROUND

1. Joint Petitioners initially sought the downgrade of KMCQ(FM), Channel 283C, The Dalles, Oregon, to Channel 283C3 and its reallottment to Covington, Washington.[3] Rather than support the proposed reallotment as required in the *NPRM*,[4] Joint Petitioners counterproposed their own proposal seeking instead to reallot the channel to Kent, Washington.

2. MISD opposed the proposed reallotment to Covington and counterproposed that KMIH(FM) be granted the equivalent of Class A status on its current channel 283 at Mercer Island, Washington and that its license be modified accordingly.[5]

3. The Audio Division issued an *Order to Show Cause*, DA 04-60, released March 12, 2004, directing Saga Broadcasting, LLC ("Saga"), licensee of KAFE(FM), Channel 282C, Bellingham, Washington, to show cause why the license for KAFE(FM) should not be modified as proposed by Counterpetitioners. Saga timely responded on April 26, 2004 seeking to demonstrate why the license for KAFE(FM) should not be modified. On that same date, Joint Petitioners withdrew their counterproposal and requested reinstatement of the original proposal.

II. THE REPORT AND ORDER FAILED TO CONSIDER NUMEROUS SUBMISSIONS

4. The *Report and Order* recites only that MISD "filed Opposition Comments" in this proceeding providing little to no analysis of those comments.[6] In addition to its Opposition

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[3] Joint Petitioners also proposed the allotment of Channel 283C1 at Moro, Oregon; Channel 261C2 at Arlington, Oregon and Channel 226A at Trout Lake, Washington in order to accommodate this proposal. *See Arlington, The Dalles, and Moro Oregon, and Covington and Trout Lake, Washington* (*NPRM*), 17 FCC Rcd 10678 (MB 2002).

[4] *Id.*

[5] Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC ("Counterpetitioners"), counterproposed the substitution of Channel 283C2 for Channel 284C2 at Aberdeen, Washington and its reallotment to Shoreline, Washington and the modification of the KDUX-FM license to specify operation on channel 283C2 at Shoreline. To accommodate the allotment at Shoreline, Counterpetitioners requested that Channel 281C be substituted for Channel 282C at Bellingham, Washington, and that the license of KAFE(FM) be modified to specify operation on Channel 281C. Joint Petitioners also proposed that the Commission take this action in order to accommodate the proposed KMCQ(FM) relocation from The Dalles, Oregon to Kent, Washington.

[6] *Report and Order*, DA 04-2054 at ¶ 5.

Comments, however, MISD submitted the following items in this proceeding, none of which received any consideration:

- Reply Comments – Commenting on Joint Petitioner's amended proposal to relocate KMCQ(FM) from The Dalles, Oregon to Kent, Washington;
- Opposition to Supplement – Opposing the Supplement filed by Joint Petitioners along with their erstwhile partner Saga Broadcasting Corp.;
- Supplement -- Further addressing the merits of MISD's proposal that the Commission grant/establish an allotment for KMIH(FM) at MISD, Washington on Channel 283A;[7]
- Statement Regarding Withdrawal of Counterproposal – Supporting Joint Petitioners withdrawal of the amended Kent proposal, but opposing reinstatement of the abandoned Covington proposal;
- Statement in Support of Motion to Dismiss – Supporting the Motion to Dismiss filed by Counterpetitioners seeking dismissal of the of Joint Petitioner's reinstated Covington proposal.

The *Report and Order* failed to even mention MISD's submission of any of the foregoing, much less analyze their assertions in the context of this proceeding. These failures – in particular the failure to consider MISD's "Statement Regarding Withdrawal of Counterproposal" and its "Statement in Support of Motion to Dismiss" -- along with the failure to provide any indication that MISD's Comments were at all considered, demonstrates a failure to adequately consider all of the facts and circumstances of this case such that reconsideration must be granted.[8] While disposition without lengthy discussion may be acceptable,[9] the failure here to give any indication

[7] No party to this proceeding opposed MISD's proposal either as originally presented or as supplemented. To the extent that Joint Petitioners may be said to have submitted an opposition to the proposal, that opposition was based solely on the incorrect assertion that MISD had failed to timely make its proposal. MISD's proposal represents the only suburban Seattle proposal presented in this proceeding that did not meet any opposition.

[8] *See Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164 (D.C. Cir. 1994) (Commission decision vacated for failure to adequately consider facts and circumstances of the case); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (ownership limits rejected due to Commission's failure to adequately consider cable/DBS competition); *U.S. WEST v. FCC*, 182 F.3d 1224, 1238-39 (10th Cir. 1999) (CPNI rules vacated because of Commission's failure to adequately consider an opt-out option).

[9] *Wendell & Associates*, 14 FCC Rcd 1671 (1998), *aff'd sub nom. Island Multimedia v. FCC*, No. 99-1027 (1999).

that MISD's pleadings were considered, much less a clear indication, warrants grant of reconsideration.[10]

III. THE TACCOA POLICY WAS MISUSED AND MISAPPLIED

5. The *Report and Order* failed to even mention, much less consider, MISD's arguments against application of the *Taccoa Policy*[11] in this case. MISD's Reply Comments well detailed that an applicant counterproposing its own proposal must supply more than just "an explanation as to why the counterproposal could not have been advanced in the original petition for rulemaking."[12] The *Taccoa Policy* requires a "careful[] review" of a rulemaking proponent's counterproposal and an "explanation, **such as unforeseen circumstances**," as to why the new proposal could not have been advanced in the initial petition for rule making."[13] Not only did Joint Petitioners fail to satisfy that burden, but the Audio Division failed to engage in the required "careful review."

6. In fact, the *Report and Order* is almost entirely bereft of any review of the circumstances underlying the Joint Petitioners counterproposal, much less a "careful review." The *Report and Order* merely takes at face value Joint Petitioners' assertion that the circumstances justified consideration of the counterproposal under *Taccoa*. More was required.

7. The "unforeseen circumstances" standard imposes a substantial burden upon petitioners who counterpropose their own proposals. That burden was not satisfied in this case. Joint Petitioners later request to withdraw the amended proposal and to return to the original proposal only serves to demonstrate why the burden must be a high one. Joint Petitioners were

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[10] *See Hispanic Broadcast System, Inc.* 16 FCC Rcd 8072, ¶ 4 (2001). This standard is applicable in the context of informal objections and should be even higher in the case of notice and comment rulemaking proceedings such as this.

[11] *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (MMB 2001).

[12] *Report and Order* at ¶ 3.

[13] *Taccoa*, 16 FCC Rcd at 21192 (emphasis added).

permitted to maintain inconsistent proposals in the same proceeding imposing a substantial burden on the staff while leaving the other parties in this hotly contested proceeding guessing as to which proposal Joint Petitioners truly desired; all without any offsetting public interest benefit.

8. Joint Petitioners were not forced to seek an alternative to the original Covington proposal or even permitted to do so by virtue of some unexpected regulatory action.[14] The *Report and Order* here attempts to establish that Joint Petitioners were at least permitted to seek an alternative because of an unexpected regulatory action, i.e., a purported change in the Canadian allotment process. But there was no such change; only Joint Petitioners' self serving "technical exhibit from a Canadian engineering firm [leading] Saga [to] "believe[] that Channel 281(c) at Bellingham can be coordinated with Canada as a specially negotiated short spaced allotment" and therefore concedes that no actual change took place.[15] This established nothing.

9. Again, Joint Petitioners were not caused or permitted by some unforeseen circumstance to abandon Covington in search of another allotment community. Furthermore, to the extent that some regulatory change did take place, it was at the behest of Joint Petitioners and in furtherance of their own business interests making the action one other than an unforeseen circumstance. *Infra.*

10. Joint Petitioners alleged inability to reach an agreement with Saga regarding the modification of KAFE prior to filing the Covington proposal was also insufficient to warrant the counterproposal's consideration. Acceptance of this justification completely ignores the fact that

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[14] *Compare, Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628 (2003) ("Saga's revised proposal [substituting Trenton for Oak Grove] was necessary due to the fact that the modification of its Station WJOI-FM license to specify Oak Grove would contravene the Commission's new multiple ownership rules"; likewise, the unforeseen stay of those rules permitted Saga to return to its original Oak Grove proposal); *Tullahoma, Tennessee and Madison, Alabama*, DA 03-2716 (2003) ("in this proceeding petitioner amended its proposal to reflect a change in the borders of the City of Madison, an event that was 'reasonably unforeseeable' to petitioner ").

[15] *Report and Order* at ¶ 3.

nothing compelled or required Joint Petitioners to file the Covington proposal in the first place. Joint Petitioners should not be permitted to propose an allotment and then amend on the claim of an unforeseen circumstance based upon its own voluntary actions.[16]

11. Assuming, arguendo, that there was an intervening event requiring or permitting the counterproposal, Joint Petitioners not only anticipated that event, they facilitated its occurrence by their pursuit of the Kent option with Saga. The "intervening event" was a voluntary action entered into based upon the exercise of the parties' own business judgment. The so called "changed circumstances" were anything but unforeseen. Having failed to justify acceptance of the counterproposal, the counterproposal should have been rejected and the original proposal dismissed.[17] *Infra.*

A. In Making the Kent Counterproposal Joint Petitioners Abandoned Covington

12. As discussed above, no unforeseen circumstances (or for that matter any other circumstances) existed that warranted acceptance of Joint Petitioners' Kent counterproposal in the context of this proceeding and that proposal should have been rejected. Further, the making of that proposal in lieu of the required present intention statement should have resulted in a

[16] *See Noblesville, Indianapolis and Fishers, Indiana*, DA 03-1118 (2003) (Commission refused to process an amended proposal under the *Taccoa Policy* because the "change in the allotment request was proposed after one of the petitioners assumed ownership of a nearby station [and] [i]n that situation, the petitioners clearly anticipated the intervening event that prompted them to revise the original allotment proposal").

[17] *See Comet Television Corp.*, 46 FCC 2d 1107, 30 RR 2d 393 (1974) (a permittee who postpones construction solely for economic considerations is deemed to have exercised its independent business judgment and the failure to construct is not an unforeseen circumstance); *Revocation of the Licenses of Password, Inc.*, 76 FCC 2d 465 (1980) (exercise of business judgment does not constitute an unforeseen circumstance); *Deltaville Communications*, 11 FCC Rcd 10793, 10798 (1996) (construction delays arising from a permittee's voluntary decision to construct facilities at variance to its permit is an independent business judgment and does not constitute a circumstance beyond the permittee's control warranting an extension); *Kin Shaw Wong*, 11 FCC Rcd 11928, 11935 (1996), *aff'd*, 12 FCC Rcd 6987 (1997) (record established that the voluntary selection of another transmitter site was a decision motivated by business judgment rather than matters beyond permittee's control); *Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline*, 12 FCC Rcd 17987, ¶ 5 (1997) ("licensee's failure to comply with our rules because of a private business decision will not warrant a grant of a rule waiver") (citations omitted).

finding that Joint Petitioners abandoned Covington such that there was nothing to be reinstated when Joint Petitioners later sought to do so.

13. Failure to make the present intention statement is fatal to an allotment proposal. The submission of comments by a rulemaking petitioner and the **present intention** restatement serve as a predicate to any action the Commission might take in the course of this proceeding.[18] Joint Petitioners rolled the dice when they abandoned Covington for Kent. Allowing reinstatement of that abandoned proposal was tantamount to the grant of a "do over" not contemplated by the Commission's policies or procedures.

14. As discussed previously, the Kent counterproposal was a voluntary action by Joint Petitioners uncompelled by any regulatory action. The reinstatement of the Covington proposal likewise was not precipitated by some regulatory action permitting the proponent to return to its favored proposal.[19] Rather, as with the counterproposal, the reinstatement request here was precipitated solely by the Joint Petitioners' business objectives.

15. In amending to Kent, Joint Petitioners were not seeking to bring their proposal into compliance with recently adopted rules.[20] Rather, Joint Petitioners voluntarily, without any unforeseen circumstances and for its own business purposes amended its original proposal.

16. Likewise, the requested reinstatement of the Covington proposal was not directed by or the result of a revision in a recently adopted rule.[21] Rather, Joint Petitioners voluntarily

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[18] *See Murray, Kentucky*, 3 FCC Rcd 3016 (MMB 1988) and *Pine, Arizona*, 3 FCC Rcd 1010 (Allocations Branch 1988) (the Commission's longstanding policy is to refrain from making an allotment to a community absent an expression of interest); *Hazelhurst, Utica and Vicksburg, Mississippi*, 9 FCC Rcd 6439 (Allocations Br. 1994) (licensee deemed to have abandoned interest in its higher class channel when no Class C3 application was filed in response to the rule making). *See also* MISD's Reply Comments, Statement Regarding Withdrawal of Counterproposal (Supporting Joint Petitioners withdrawal of the amended Kent proposal, but opposing reinstatement of the abandoned Covington proposal) and its Statement in Support of Motion to Dismiss (Supporting the Motion to Dismiss filed by Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC).

[19] *See* n. 10, supra.

[20] *Supra.*

withdrew the amended proposal in favor of the original proposal solely to avoid compliance with a Show Cause order and to defeat the possibility that Counterpetitioner's counterproposal might be accepted.

17. Joint Petitioners failed to adequately justify the need for the counterproposal and likewise failed to provide any justification for the withdrawal of that proposal and reinstatement of the original proposal. Unlike the parties in *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, who were essentially forced to abandon their proposed move to Oak Grove, Kentucky because of the Commission's adoption of new multiple ownership rules and who then sought reinstatement of that proposal when those rules were stayed, nothing compelled the Joint Petitioners to seek out an alternative community by way of a counterproposal other than its own business dealings and nothing changed so as to require reinstatement of the original proposal.

18. Joint Petitioners never provided any reason, much less a compelling one, supporting reinstatement of the original proposal. To the contrary, the Joint Petitioners' "Withdrawal of Counterproposal" firmly established that nothing compelled the withdrawal of the counterproposal other than a **voluntary decision** to abandon the counterproposal: "The Joint Petitioners have decided that they will not pursue the Counterproposal submitted in response to the *Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (2002), in this proceeding."[22] At that point, Joint Petitioners should have been dismissed from this proceeding since they no longer had any request (valid or otherwise) pending before the Commission. No basis existed for consideration of the Covington proposal, much less the grant of that proposal.

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[21] *Compare, Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628. In seeking the withdrawal, the petitioner there recognized that its request was a "most extraordinary one." "Request to Withdraw Uncontested Counterproposal and Reinstate Original Proposal," MM Docket No. 03-132, submitted September 25, 2003.

[22] Withdrawal at para. 1.

19. Joint Petitioners attempt to establish a need for reinstatement based on Saga's alleged withdrawal of consent to the substitution of Channel 281C for 282C at Bellingham[23] was insufficient to establish a need for reinstatement. It too was a voluntary decision uncompelled by anything other than a desire to avoid having to reveal the nature, terms and conditions of the agreements underlying Saga's earlier consent. Moreover, having voluntarily entered into the agreement, Joint Petitioners should be held to have assumed the risk that Saga might be compelled to grant the same conditions to a third party and the consequences from a decision to avoid that result.

20. A private business decision will not warrant a grant of a rule waiver and it should not allow Joint Petitioner's here to wreak havoc with the Commission's procedural rules depending upon what their needs might tend to be at any particular moment.[24] The Joint Petitioners' made a business decision to abandon Covington for Kent and likewise made a business decision to later withdraw that counterproposal in an effort to return to their earlier abandoned proposal. In permitting these actions, the Audio Division has sacrificed the Commission's processes in the name of administrative expediency leading to the establishment of a dangerous precedent.

21. The submission of a counterproposal in lieu of the requisite statement of continuing interest in Covington constituted a specific withdrawal of interest in Covington and the abandonment of that proposal. Given Joint Petitioners' voluntary abandonment of the Covington proposal, when Joint Petitioners withdrew the Kent proposal, they no longer had any proposal before the Commission for consideration. At that point, Joint Petitioners should have been dismissed from this proceeding.

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[23] To MISD's knowledge, no item has been submitted in this proceeding documenting Saga's withdrawal of consent.
[24] *See Styles Interactive, Inc.* 12 FCC Rcd. 17987, ¶8 (1997).

22. Finally, neither Joint Petitioners nor Saga, either collectively or individually, ever represented to the Commission that the underlying agreements have been terminated. To the contrary, Saga's "Response to Order to Show Cause" referred to these agreements in the present tense, stating they are "in effect," suggesting that the Joint Petitioners' withdrawal request is merely a tactical one.[25] The Audio Division's failure to consider this issue, notwithstanding the fact that MISD raised it below, warrants reconsideration.[26]

B. Reinstatement of the Covington Proposal Failed to Serve the Public Interest

23. The Audio Division failed to consider that the public neither had notice nor an opportunity to comment on the withdrawal of the counterproposal and the reinstatement of the Covington proposal. The APA's notice and comment requirements have not merely been ignored, they have been trampled upon.

24. The Audio Division likewise failed to address MISD's contention that the *Taccoa Policy* fails to serve the public interest and that it ought to firmly establish a policy prohibiting rulemaking proponents from counterproposing their own proposals. As this case so amply demonstrates, aside from the APA issues that arise, permitting rulemaking proponents to do so works an unnecessary hardship on the Commission and its staff and imposes an intolerable burden and works an intolerable unfairness on other parties and the public interest.

IV. THE PUBLIC INTEREST IS BEST SERVED BY THE GRANT OF A CLASS A ALLOTMENT TO KMIH(FM) AT MERCER ISLAND

25. The Audio Division failed to fully consider the public interest benefits to be derived by the maintenance of the KMIH(FM) service at Mercer Island and the grant of a Class A

[25] No where in that item did it state that it was withdrawing its consent to the substitution.

[26] *See* MISD's Statement Regarding Withdrawal of Counterproposal – Supporting Joint Petitioners withdrawal of the amended Kent proposal, but opposing reinstatement of the abandoned Covington proposal and its Statement in Support of Motion to Dismiss – Supporting the Motion to Dismiss filed by Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC (collectively, "Triple Bogey") seeking dismissal of the of Joint Petitioner's reinstated Covington proposal.

allotment to KMIH(FM) at Mercer Island, Washington. The decision to sacrifice the "valuable service"[27] being provided by KMIH(FM) for just another commercial Seattle station flies in the face of sound public policy.

A. The Report and Order Failed to Fully Consider the Merits of a Class A Allotment to KMIH(FM) at Mercer Island

1. The Proposed Class A Allotment at Mercer Island did not Receive the Consideration to Which it Was Entitled

26. MISD's proposal was initially rejected, at least in part, due to the availability of alternate channels to which it could relocate.[28] The *Initial Order* never identified the specific channels available to KMIH(FM). Neither the *Rescission Order* nor the *Report and Order*, which is identical to the *Initial Order* but for the lack of a statement regarding the alternate channels available to KMIH(FM), identified why the *Initial Order* was rescinded.

27. The only discernable reason is that no alternative channels exist.[29] The blind statement that channels existed and then the removal of that statement without any explanation is simply one more indicant of an unconsidered application of a first local preference in this case at the expense of a full and fair deliberation of the facts and circumstances and the public interest.

28. The Audio Division also failed to rationalize how the service area's receipt of "service from 23 FM stations and 5 AM stations" can count as a factor against retention of an existing KMIH(FM) local service, but not be a factor at all in considering whether to allow an out of state move-in that will result in KMIH(FM)'s demise. If the number of stations serving the area can justify a *de facto* decision to delete the KMIH(FM) service, then it stands to reason

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[27] *Report and Order* at ¶ 5.
[28] *Report and Order* ("*Initial Order*"), DA 04-1540, released May, 28, 2004, *rescinded*, DA 04-1647, released June 8, 2004 ("*Rescission Order*").
[29] KMIH(FM) would gladly move to one were it available.

that these stations' existence must at least be considered in determining whether to grant Joint Petitioners' requested allotment.

2. Retention of the KMIH(FM) Service Fosters Localism

29. How often asked is the question "What's happening with America's youth today?" In this case, the answer is they are watching the federal government take away ***their*** local radio station and a positive learning environment in order to accommodate the commercial interests of a non-local/out of state entity with absolutely no intent or interest to serve the local community. To find Joint Petitioners' lack of interest in the local community, one need look no further than the voluntary decision to abandon Covington for Kent when it thought the conditions favorable to do so and to then abandon Kent for Covington for administrative expedience's sake when it appeared like a failure to do so might compromise their business objectives.

30. Chairman Powell "created the Localism Task Force to evaluate how broadcasters are serving their local communities. Broadcasters must serve the public interest, and the Commission has consistently interpreted this to require broadcast licensees to air programming that is responsive to the interests and needs of their communities."[30] KMIH(FM) has been serving the public interest through the airing of programming responsive to the needs and interests of the Mercer Island community and through the positive learning environment it creates for the students of Mercer Island High School.

31. MISD's Comments detailed how KMIH(FM), notwithstanding its Class D status, provides a valuable and irreplaceable service to the Mercer Island Community.[31] The Audio

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[30] http://www.fcc.gov/localism/. *See also*, *Notice of Inquiry*, DA 04-129, released July 1, 2004.

[31] This program: teaches students the essentials of broadcasting; teaches and promotes programming, production, promotions, Commission rules, community service, EAS, and other methods of radio-based emergency response, computer training in a broadcast setting, Internet web design, and engineering and radio theory; provides an invaluable service to the school and the local area with its live broadcasts of community events and MIHS athletics

Division's failure to factor the loss of this service into the equation fails to serve the public interest.

46. The loss of KMIH(FM) and the loss of the valuable educational resource that is the radio program at Mercer Island High School that will result from the implementation of the grant of the reallotment proposal will be disastrous to the high school, the school district and the community at large with no countervailing public interest benefits. The decision here to allot a distant broadcaster what amounts to KMIH(FM)'s channel and effectively shutter KMIH(FM), fails to serve the localism mandate and therefore fails to serve the public interest.

3. Denial of a Class A Allotment to KMIH(FM) at Mercer Island Fails to Serve the Public Interest

32. The Audio Division's attempt to justify its decision not to award an allotment to KMIH(FM) because of its failure to satisfy Section 73.207's minimum distance separation requirements is wanting. Any failure to satisfy those requirements should have been found to be immaterial given that this is unlike the typical allotment proceeding. The Audio Division failed to adequately consider KMIH(FM)'s present operations as a virtual Class A on a non-interfering basis.[32]

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providing not only a special service to the community, but also a singular opportunity for students to learn and experience the art of love play-by-play broadcasting and for the studio crew to experience live remote broadcasting from the technical side. KMIH(FM) is an active member of the Washington State Emergency Broadcast team and MIHS students are trained and practiced in proper EAS procedures in accordance with the Commission's rules. Such procedures were put to the test in 2001 when a moderate earthquake shook Seattle. Within minutes, MIHS students were on the air dealing with the situation and providing much needed information to the community. The Mercer Island Department of Public Safety also relies on KMIH(FM). MISD Comments at Attachment XVI. Over 60 students are currently directly involved in the MIHS radio vocational program though many more are involved in the station on a daily basis. Many KMIH(FM) graduates are now employed in the broadcast industry while many others have obtained apprenticeships out of high school or immediately became involved in high positions at college radio stations. The first hand experience they gained at KMIH(FM) undoubtedly played a great role.

[32] KMIH(FM)'s status as a virtual Class A predates not only the *Report and Order's* release, but the filing of Joint Petitioners' petition for rulemaking.

33. The *de facto* demise of KMIH(FM) by virtue of the grant of the KMCQ(FM) proposal establishes a "compelling need" for grant of a waiver of § 73.207 and adoption of the proposed allotment for KMIH(FM) at Mercer Island.[33] The fact that the station currently operates on an interference free basis from its present location is a significant factor supporting grant of a waiver.[34] The Audio Division ignored this while failing to explain how such a limited waiver will in any way adversely affect the integrity of the Table of Allotments.

34. The public interest will be best served by adoption of the MISD proposal and the retention of the KMIH(FM) service at Mercer Island.

B. The Mercer Island Community Has a Legitimate Expectation of Continued Service by KMIH(FM)

35. MISD's original Comments well documented the community's legitimate expectation of continued service by KMIH(FM) based upon its long service in the public interest.[35] Section 307(b) of the Act requires that this expectation must be weighed against the benefits that may result from the reallotment of KMCQ(FM) from The Dalles to Covington.[36]

36. In that regard, removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued local service."[37] The *Report and Order* did not recite any benefits to be achieved here other than the illusory allotment of a first local preference to Covington and did not engage in any weighing of that benefit versus the loss of

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[33] *Bristol, Tennessee*, 46 RR 2d 650, 651 (1979) (compelling justification necessary to waive allotment spacing requirements); *Eatonton and Sandy Springs, Georgia and Anniston and Linville, Alabama*, 6 FCC Rcd 6580, 6584 (1991); *Toms River, New Jersey*, 43 FCC 2d 414, 417 (1973).

[34] *Metro Telecom, Inc.*, DA 03-2380 (2003) (waiver granted to allow applicant to operate private land mobile radio (PLMR) systems on frequencies that are offset 12.5 kHz from frequencies allotted to the Air-Ground Radiotelephone Service where underlying purpose of rule to prevent interference by ineligible services would not be served in case of station presently operating in the band on an interference free basis).

[35] MISD's original comments contained samples of letters of support the station received.

[36] *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094, 7097 (1990).

[37] *Appleton, New London and Suring, Wisconsin*, 8 FCC Rcd 181, ¶ 7 (1993).

service at Mercer Island. Accordingly, not only did the Audio Division fail to identify "sufficient public interest factors to offset the expectation of continued local service," but it never even engaged in the inquiry. Reconsideration is warranted given the failure to engage in that balancing process.

V. THE PROPOSED REALLOTMENT FAILS TO ACHIEVE A FAIR, EFFICIENT AND EQUITABLE DISTRIBUTION OF RADIO SERVICE

37. The *Report and Order* here completely neglects the people of Mercer Island in favor of the illusory first local preference to Covington and fails to achieve a "fair, efficient and equitable distribution of radio service"[38] The grant of a dispositive preference here resulted in precisely the anomalous result, i.e., an "artificial or purely technical manipulation of the Commission's 307(b) related policies," the Commission sought to avoid when a station seeks to relocate to a suburban community in or near an Urbanized Area.[39] Grant of Joint Petitioners' proposal has resulted in the shifting of service from an underserved rural area to a well served urban area at the expense of an existing local service without any countervailing benefits.

38. The *Tuck* analysis here was so cursory as to almost belie belief. The *Report and Order* did not even mention, much less consider, any countervailing arguments or evidence against a Covington finding. MISD's Comments established Covington to be undeserving of a first local service preference based upon application of the *Tuck* criteria consistent with Section 307(b).[40] Indeed, Joint Petitioners themselves consider and refer to the allotment as a Seattle allotment rather than one for Covington.[41]

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[38] *National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984).

[39] *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988); *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7096 (1990).

[40] *See Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), and *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990).

[41] Attachment A hereto is a copy of a Memorandum dated January 24, 2004 from Jonathan N. Edwards of du Treil, Lundin & Rackley, Inc., Joint Petitioners' consulting engineer to Joint Petitioners stating, in pertinent part: "This

A. The Report and Order Failed to Adequately Explain its Reliance on Joint Petitioners' Signal and Population Coverage Showing

39. Contrary to Joint Petitioners' contention and the *Report and Order's* finding, the proposed channel 283C3 allotment at Covington will serve far in excess of 8.8% of the urbanized area. Appendix A to MISD's Comments was a Dataworld study showing propagation contours from the proposed site based upon the minimal information (minimum Class C3 – 25kw, 100m HAAT) supplied by the Joint Petitioners.[42] MISD demonstrated that the proposed Covington facility will provide 70 dBu service to 39% of the Seattle Urbanized Area 60 dBu service to 71% of that area – far in excess of the 8.8% coverage proffered by Joint Petitioners.

40. Joint Petitioners apparently derived their 8.8% figure by examining the Seattle Urbanized Area as defined in the 1990 census.[43] The Census Bureau revised its urbanized area classification criteria in the 2000 census combining Seattle and Tacoma into one urbanized area with a population count of 2,712,205.[44] A more recent Dataworld study commissioned by MISD shows that the proposed allotment will provide 70 dBu service to 1,250,325 persons or 46% of the urbanized area and 60 dBu service to 1,875,187 persons or 69% of the urbanized area.[45]

41. Not only did Joint Petitioners fail to rebut this showing but, even worse, the *Report and Order* never even took it under consideration. The *Report and Order's* finding that this factor weighed in favor of the allotment was in error.

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memo will report on alternate channel search conducted for Class D station KMIH(FM), at Mercer Island, WA in order to permit the KMCQ(FM) move into the Seattle market on channel 283C3/C2 (104.5 MHz)."

[42] Noticeably, Joint Petitioners contour maps did not even identify Covington as a place. Joint Petitioners also failed to demonstrate that city grade coverage can be provided over Covington. The existence of a significant ridge between the reference site in Enumclaw and Covington will likely prevent KMCQ(FM) from being able to cover Covington with a 70 dBu contour. See Attachment B hereto.

[43] *See* Technical Narrative to Joint Petitioners Petition for Rule Making.

[44] Qualifying Urban Areas for Census 2000, 67 Fed. Reg. 21962, 21963, 21967 May 1, 2002.

[45] Attachement C hereto.

B. Covington is Proximately Located to Seattle

42. The *Report and Order* failed to fully consider size and proximity issues. The *Report and Order* merely concluded independence from the Seattle Urbanized Area based on Covington's population (13,801) and distance from Seattle (15 km), but failed to provide any substantive analysis on the issue and again ignored MISD's Comments and the context they provided. MISD demonstrated a substantial disparity in size between Covington and Seattle – Covington is 1/40th the size of Seattle and 1/20,000 the size of the Seattle Urbanized Area -- strongly suggesting that Covington is interdependent with the much larger central city of Seattle and the Seattle Urbanized Area.[46] The *Report and Order's* finding that this factor weighed in favor of the allotment was in error.

C. Covington is Interdependent with the Seattle Urbanized Area

43. The *Report and Order* likewise failed to engage in any kind of reasoned analysis on the third of the *Tuck* criteria and its eight factors. Had such an analysis been conducted, no other finding could have been reached but that Covington is not independent of the Seattle Urbanized Area for these purposes.[47]

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[46] *See Wallace, Idaho and Lolo, Montana*, 14 FCC Rcd 21110 (1999) (Missoula 15 times the size of Lolo favored attribution); *Marysville and Hilliard, Ohio*, 14 FCC Rcd 18943 (1999) (attribution favored where proposed community of Hilliard, population 11,796 was located five miles from Columbus); *Greenfield and Del Rey Oaks, California*, 11 FCC Rcd 12681 (1996) (though Del Rey was a community for purposes of allotment, small size and proximity to central cities of urbanized area weighed against finding community to be sufficiently independent of its Urbanized Area to warrant an allotment); *Clovis and Madera, California*, 11 FCC Rcd 5219 (1996) (attribution favored in case of community 1/7 the size and located 6 miles from central city); *KFRC*, 5 FCC Rcd at 3223 (Richmond interdependent with central cities despite the fact that it was not contiguous with either Oakland or San Francisco, was located 16 miles away and was 1/9th the size of San Francisco).

[47] The factors to be examined are as follows: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2)whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified